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No. 88-1684

In The

Supreme Court of the United States

October Term, 1988

WILLIAM P. HENDERSON,

Petitioner,

v.

L. G. BALFOUR COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the United States Court of Appeals for the Fifth Circuit correctly interpret and apply Massachusetts law when it held that the petitioner did not prove a violation of an implied covenant of good faith and fair dealing because: (1) the record contained no evidence of constructive discharge; and (2) Massachusetts case law has settled that an employee's implied covenant of good faith and fair dealing does not encompass future compensation for future services, the sole basis for the petitioner's claim.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner, William P. Henderson, and the respondent, L. G. Balfour Company. The parent company of L. G. Balfour Company is Town and Country Jewelry Manufacturing Corporation, Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, L. G. Balfour Company ("Balfour" or the "Company"), respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Fifth Circuit's opinion in this case. The Fifth Circuit's opinion is reported at 852 F.2d 818 (5th Cir. 1988).

STATEMENT OF THE CASE

Balfour sells class rings and graduation-related products. In the spring of 1981, Balfour hired the petitioner,

William P. Henderson, as a sales representative in its northeast Texas regional office. The petitioner was a former employee of Star Engraving Company ("Star"). Balfour and the petitioner agreed that he would be given the same territory at Balfour that he had worked while at Star. In return, the petitioner promised to make every effort to transfer his existing business from Star to Balfour. The duration of the employment contract was expressly limited to three years, running from July 1, 1981, to June 30, 1984, but was terminable by either party on thirty days' written notice. Balfour agreed to provide the petitioner with a salary of $54,307.26, various support services to facilitate the sale of the Company's products, and specified retirement benefits. The $54,000 salary was the highest of any salesperson in the regional office. The parties also agreed that Massachusetts law was to govern this agreement.

The petitioner commenced his employment with Balfour on July 1, 1981. Within the first year, he transferred almost all of his existing business from Star to Balfour. Over the next two years, however, the petitioner made little effort to solicit any new business, despite his admission at trial that there were "plenty of other schools out there that [he] did not do business with." In the two years following the 1981-1982 school term, the petitioner's total sales actually declined, even though he was required to expend relatively little effort to hold on to his business once it had been transferred.

The cumulative effect of the petitioner's high guaranteed salary and his failure to maintain existing sales or to generate additional sales left Balfour's northeast Texas regional office operating at a deficit on the petitioner's

accounts. Despite the deficit, Balfour did not exercise its right to terminate the employment relationship. Moreover, it honored every term of the 1981 contract.

In February 1984 Balfour invited the petitioner to submit a proposal concerning the terms of any potential employment with Balfour following the expiration of the three-year contract. He *never* responded to the invitation. By late May 1984, with the expiration of the 1981 contract little more than one month away and no proposal forthcoming from the petitioner, Balfour, rather than terminating him without benefits as it was entitled to do, presented him with three proposals for the 1984-1985 school year. These proposals responded to the decline in the petitioner's business and the consequent failure of the petitioner to cover his salary and share of the office's expenses. The options presented to the petitioner were as follows:

(1) The petitioner could retire effective July 1, 1984, under the terms of his 1981 contract.

(2) The petitioner could continue his employment with the identical position, territory and support services, but at an adjusted salary ($41,450) that provided increased incentives (a 50% commission) for the generation of new business. This was by far the most generous compensation package provided to any salesperson in the petitioner's region. The retirement benefits under his previous three-year agreement were also expressly guaranteed.

(3) The petitioner could continue to work from July 1, 1984, through January 1, 1985, at a modified salary essentially in line with that offered in proposal two, and

then retire receiving over $50,000 in retirement benefits to be paid from September 1, 1984, to January 1, 1986.

On June 18, 1984, the petitioner elected proposal three. He worked the full six months, was paid the entire $20,000 called for under proposal three, and received his full retirement benefits.

On June 12, 1985, the petitioner filed a multiple count complaint against Balfour in the United States District Court for the Northern District of Texas. The complaint alleged that Balfour (1) unlawfully discriminated against the petitioner in violation of the Age Discrimination in Employment Act; (2) breached the petitioner's employment contract in contravention of Massachusetts law; and (3) breached the covenant of good faith and fair dealing implied in Massachusetts employment contracts. The complaint also alleged intentional infliction of emotional distress and requested the imposition of punitive damages.

The case was tried before the Honorable William M. Steger. No evidence was presented at trial that Balfour acted in bad faith or deliberately sought to induce the petitioner's departure by offering him the three proposals. Indeed, the petitioner offered no evidence that Balfour did not want him to continue the employment relationship.

At the close of evidence Balfour moved for a directed verdict on all counts. The court granted Balfour's motion on the claims for intentional infliction of emotional distress and punitive damages. The court denied the remainder of the motion and submitted to the jury the three

counts still remaining (age discrimination, breach of contract, breach of implied covenant of good faith and fair dealing). The jury returned a verdict in favor of the petitioner only on his claim under the implied covenant of good faith and fair dealing,[1] finding damages totalling $263,765.34. On May 22, 1987, Balfour moved for a judgment notwithstanding the verdict or, in the alternative, a new trial. The district court denied the motion.

Balfour appealed the denial of its motion to the Fifth Circuit. On August 18, 1988, the Circuit ruled that the district court had erred in denying Balfour's motion for a judgment notwithstanding the verdict. The court reasoned that: (1) on the record before it, the jury had insufficient evidence to find that Balfour constructively discharged the petitioner; and (2) the implied covenant does not protect future compensation for future services, the sole basis for the petitioner's claim. The court therefore held as a matter of Massachusetts law that Balfour did not breach the implied covenant of good faith and fair dealing. The court reversed the district court and rendered judgment for Balfour.

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[1] In his brief, the petitioner suggests that the jury was entitled to find that he had a contract with Balfour requiring his continued employment. The jury rejected the contract claim, however, a decision the petitioner did not challenge either before the trial or appellate court.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE PETITION DOES NOT RAISE ISSUES THAT MERIT THE GRANTING OF CERTIORARI.

As stated in Supreme Court Rule 17.1, "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted *only when there are special and important reasons therefor.*" (Emphasis added.) Rule 17.1 further explains that the Court will look to the following types of factors in determining when to exercise its discretion to grant review:

> 1. When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> 2. When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Sup. Ct. R. 17.1(a), (c). The petition at issue presents none of these reasons,[2] nor any other ground that merits review by this Court.

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[2] The petition does not suggest that the Fifth Circuit "so far departed from the accepted and usual course of judicial proceedings" to justify review. Sup. Ct. R. 17.1(a). As a result, no discussion is necessary on that aspect of Rule 17.1.

A. *The Fifth Circuit's Decision Does Not Conflict With The Decisions Of Any Other Circuit.* At trial, the petitioner prevailed on only one claim, that Balfour terminated him in violation of the implied covenant of good faith and fair dealing under Massachusetts law. Balfour's appeal challenged this determination, arguing that as a matter of Massachusetts law the Company's conduct towards the petitioner did not contravene the implied covenant. Thus the issue before the Fifth Circuit had no federal overtones to it; the court was required only to interpret and to apply Massachusetts law.

Given the nature of the appeal, the Fifth Circuit correctly based its decision solely on Massachusetts legal principles. In reversing the district court's denial of Balfour's request for a judgment notwithstanding the verdict, the Fifth Circuit relied on two distinct and independent grounds. First, the court found that as a matter of Massachusetts law Balfour did not affirmatively or constructively terminate the petitioner. (Pet. 27). The court recognized that the absence of a discharge precluded any recovery under the implied covenant. *Id.* (citing *McCone v. New England Telephone and Telegraph Co.*, 393 Mass. 231, 234 n.7, 471 N.E.2d 47, 50 n.7 (1984) (implied covenant applies only when an employee is discharged)).

Second, the court rejected the petitioner's contention that the implied covenant protects a salesperson's loss of future compensation for future orders. Again relying on Massachusetts law, the court recognized that the implied covenant encompasses only future compensation for *past* services. The petitioner did not and could not contend that he had been deprived of any such compensation.

(Pet. 27-28) (citing *Gerald Rosen Co., Inc. v. International Telephone and Telegraph Co.*, 16 Mass. App. Ct. 929, 450 N.E.2d 189 (1983)).

Neither of the Fifth Circuit's two grounds for reversing the district court involved the application of federal law or federal legal principles. Both were based on a careful analysis of Massachusetts law and the reach of the implied covenant. No other federal court of appeals has had occasion to interpret or to apply the implied covenant of good faith and fair dealing as established under Massachusetts law. Accordingly, the Fifth Circuit's decision does not conflict – and could not have conflicted – with the decision of any other circuit.[3]

B. *The Fifth Circuit's Decision Does Not Involve A Federal Question.* The Fifth Circuit rested its decision entirely on Massachusetts law. Consequently, the court cannot have "decided a *federal question* in a way in conflict with a state court of last resort." Sup. Ct. R. 17.1(a) (emphasis added). Nor can the decision have involved "an important question of *federal law* which has not been, but should be, settled by" this Court. Sup. Ct. R. 17.1(c) (emphasis added). In short, because of its exclusive focus on state law, the decision below does not raise any issue that justifies review by this Court.

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[3] The petitioner contends that a conflict in the circuits exists. (Pet. 16). However, the cases identified as being in conflict with the decision below are merely opinions that refer to the initial Massachusetts case construing the implied covenant, *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977). None of the cases cited by the petitioner interprets the doctrine established in *Fortune* or discusses the issues raised in the case at bar.

C. *The Fifth Circuit's Decision Does Not Conflict With Any Decisions Of This Court.* The Supreme Court has never addressed any aspect of Massachusetts' implied covenant of good faith and fair dealing. With no Court pronouncement on the implied covenant, the Fifth Circuit's ruling does not conflict with any decision of this Court, let alone involve the resolution of "a federal question in a way in conflict with applicable decisions of this Court." Sup. Ct. R. 17.1(c).[4]

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[4] The petitioner's only argument to the contrary appears to come when he quotes the standard for granting a judgment notwithstanding the verdict set forth by this Court in *Brady v. Southern Railroad Co.*, 320 U.S. 476, 480-81 (1943). (Pet. 5). The petitioner seems to argue that the Fifth Circuit did not correctly apply the *Brady* standard and that its opinion therefore conflicts with a decision of this Court. This argument is without merit for a number of reasons.

First, the Fifth Circuit has embraced the requirements established in *Brady* for granting a judgment notwithstanding the verdict. *See Thezan v. Maritime Overseas Corp.*, 708 F.2d 175, 179 (5th Cir. 1983), *cert. denied*, 464 U.S. 1050 (1984); *Rosenberg v. Trautwein*, 624 F.2d 666, 669 (5th Cir. 1980).

Second, notwithstanding the petitioner's claim to the contrary, the Fifth Circuit did not attempt to weigh the credibility of witnesses. The court's determination that the implied covenant does not encompass future compensation for future orders involved the resolution of strictly a legal question; no significant factual assessments were required. Although the court's ruling that the petitioner was not constructively discharged necessitated a review of the record, the Fifth Circuit correctly found no evidence that the conditions of employment had become objectively intolerable. The petitioner has not presented any facts to the contrary either to the appeals court or to this Court.

(Continued on following page)

D. *Conclusion.* The Fifth Circuit rendered its decision based on a review of the evidence and a reasonable interpretation of Massachusetts law. Nothing in the decision warrants review by this Court. Indeed, were the Court to grant the petition, its analysis would necessarily focus on one of two concerns, neither of which is significant in the certiorari context. The Court would need to determine whether the Fifth Circuit erred under Massachusetts law in holding either (1) that the implied covenant does not apply to future compensation for future services; or (2) that the evidence adduced at trial was insufficient to support the jury's finding that the petitioner was constructively discharged. The first issue is purely a question of Massachusetts law in which the Supreme Court has no interest. The second involves a review of the transcript for sufficiency of evidence, a task in which it is not appropriate for the Court to engage. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) (this Court does not grant certiorari "to review evidence and discuss specific facts"); *see also Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.).

In sum, the petition presents no significant legal issue whose resolution will substantially advance current legal doctrines, and no federal question at all. Only the parties, if anyone, would benefit from Supreme Court review. This Court has long held that it grants certiorari only "in cases involving principles the settlement of

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Finally, even if the Fifth Circuit had not correctly applied the standard applicable to a judgment notwithstanding the verdict, the error would not constitute grounds for granting certiorari. This Court's decision whether to issue the writ does not depend on "the perceived correctness of the judgments [it] is asked to review." *Ross v. Moffitt*, 417 U.S. 600, 617 (1974).

which is important to the public, as distinguished from that of the parties." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *see also Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955) (this Court does not sit for the benefit of particular litigants). The petition before the Court does not remotely satisfy this public-interest requirement.

II. THE FIFTH CIRCUIT CORRECTLY INTERPRETED AND APPLIED MASSACHUSETTS LAW.

Even assuming *arguendo* that this Court might grant certiorari where its review would benefit only the parties to the litigation, the issuance of the writ would still be inappropriate in the present case. The Fifth Circuit correctly analyzed and applied the law of Massachusetts. This Court's review would not lead to a different result and thus would not materially benefit either party.

A. *The Petitioner Was Not Constructively Discharged.* As the Fifth Circuit recognized, and as the jury found, the petitioner was an at-will employee. Under Massachusetts law, an employer historically enjoyed the unencumbered right to terminate such an employee for any or no reason. *See, e.g., Fortune v. National Cash Register Co.*, 373 Mass. 96, 100, 364 N.E.2d 1251, 1255 (1977); *Fenton v. Federal Street Building Trust*, 310 Mass. 609, 612, 39 N.E.2d 414, 415 (1942). This rule remains largely intact and is subject to very limited exceptions.

The implied covenant of good faith and fair dealing represents the primary modification to the at-will doctrine in Massachusetts. Under the implied covenant, an employer may not discharge an employee solely to

deprive him or her of an already earned financial benefit of the employment relationship. *See Fortune*, 373 Mass. at 104-105, 364 N.E.2d at 1257. Before the district and appellate courts, the petitioner relied exclusively on this rationale in arguing that Balfour breached the implied covenant.

Massachusetts courts "have held employers liable for breach of the implied covenant of good faith and fair dealing *only when they have terminated* an employee." *McCone*, 393 Mass. at 234 n.7, 471 N.E.2d at 50 n.7 (emphasis added). In the case at bar, the petitioner quit his employment but claimed that Balfour constructively discharged him. The petitioner has acknowledged, as the Fifth Circuit stated, that a constructive discharge occurs only if "the employer made conditions so intolerable that the employee *reasonably* felt compelled to resign." (Pet. 27 n.1) (emphasis in original).

The Fifth Circuit agreed with Balfour's assertion that the petitioner presented no evidence of objectively intolerable conditions and that the district court therefore erred in denying Balfour's motion for judgment notwithstanding the verdict. In making this determination, the court conducted a *de novo* review of the record, *see Rosenberg v. Trautwein*, 624 F.2d 666, 669 (5th Cir. 1980), and undoubtedly recognized that it could sustain the jury's verdict only if some reasonable view of the evidence supported the result. *Thezan v. Maritime Overseas Corp.*, 708 F.2d 175, 179 (5th Cir. 1983), *cert. denied*, 464 U.S. 1050 (1984).

The Fifth Circuit was correct in holding that the record evidence did not support a finding of constructive

discharge. The sole basis underlying the petitioner's assertion of constructive discharge is that Balfour reduced his salary while it increased his incentive compensation. But it offered him the alternatives of retirement at full benefits or retirement after six months, and it conspicuously did not assert its clear contractual right to retire him after thirty days with no benefits. The argument that the offer was in essence unconscionable and itself justified a finding of constructive discharge is, as the Fifth Circuit held, without merit.

The petitioner was presented with a more generous compensation package than any other salesperson in his region, and with the opportunity to garner more compensation than under his 1981 contract if he increased his sales volume – which he acknowledged was possible. More fundamentally, as the expiration of his employment contract approached, Balfour, under no obligation to make any offer of continued employment, gave the petitioner three reasonable alternatives. He chose one, worked for the full additional time it called for, was paid the full salary and retirement benefits it provided, and then sued.

On these facts, the Fifth Circuit was correct when it ruled that "it is impossible to conclude that [the petitioner] was constructively discharged." (Pet. 27). No reasonable view of the evidence suggests that the conditions of the petitioner's employment had become objectively intolerable, financially or otherwise. Nor did he contend to the contrary until he had received the proposal's full benefits without complaint. As the Fifth Circuit noted, "to adopt [the petitioner's] view, we would have to accept the notion that for an employer to propose changing the

terms of an employee's compensation so as to lower his guarantee but raise his contingent compensation is intolerable, a curious proposition indeed." (Pet. 25 n.2). The Fifth Circuit committed no error in ruling that the evidence did not support the jury's finding of constructive discharge.

B. *The Implied Covenant Does Not Encompass Future Pay For Future Orders.* Even if the record somehow supported the petitioner's claim of constructive discharge, the Fifth Circuit's reversal of the district court was appropriate. Massachusetts case law compelled the court's decision that the implied covenant does not extend to future compensation for future orders.

In claiming a breach of the implied covenant, the petitioner's sole assertion was that Balfour's conduct deprived him of the opportunity to earn future commissions based on possible future orders. More specifically, he argued that his past service in building accounts and transferring them to Balfour would result in future income for the Company. The petitioner contends that the implied covenant entitled him, not Balfour, to retain the future income.

The Fifth Circuit properly rejected the petitioner's argument as a matter of law. The court recognized that the implied covenant applies only if the employee's termination leads to a deprivation of future compensation for *past* services. (Pet. 26). This is an accurate statement of Massachusetts law. *See, e.g., Gram v. Liberty Mutual Insurance Co.*, 391 Mass. 333, 334, 461 N.E.2d 796, 797 (1984); *Gram v. Liberty Mutual Insurance Co.*, 384 Mass. 659, 660, 429 N.E.2d 21, 22 (1981) (an employer is liable only for

the loss of "identifiable, reasonably anticipated future compensation, based [upon] past services"). The Fifth Circuit went on to find that the petitioner had not presented a claim for future compensation based on past services, but for future compensation related to future services:

> Although Balfour has Mr. Henderson's former accounts, given a competitive market it is not clear that it can keep them. Hence, future income is not merely a function of Mr. Henderson's past services. For this reason, Mr. Henderson's contention and the jury's decision that the implied covenant of good faith and fair dealing was breached are incorrect as a matter of (Massachusetts) law.

(Pet. 26).

In reaching this conclusion, the court relied heavily on a Massachusetts decision on all fours with the case at bar. Like the petitioner, the plaintiff in *Gerald Rosen Co., Inc. v. International Telephone & Telegraph Co.*, 16 Mass. App. Ct. 929, 450 N.E.2d 190 (1983), was a sales representative who claimed to have built up the defendant employer's sales and thus created an expectation of future orders. Also like the petitioner, the plaintiff argued that such an expectation provided a basis for recovery of damages under the implied covenant. In rejecting that assertion, the Massachusetts Appeals Court stated that "the plaintiff here has been paid the commissions on the orders it took, and the fact that its efforts may have augmented the prospect for *future orders* does not bring its situation within the ambit [of the implied covenant]." *Id.* at 929, 450 N.E.2d at 190 (emphasis added).

Rosen clearly teaches that salespeople are not entitled under Massachusetts law to use the implied covenant to recover for future sales made to former customers – precisely the argument of the petitioner. In exercising its pendent jurisdiction, the Fifth Circuit correctly followed the Massachusetts Appeals Court's decision. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966); *Taylor v. Jim Walter Corp.*, 731 F.2d 266, 267 (5th Cir. 1984). Consequently, as a matter of Massachusetts law, even if he had been constructively discharged, the petitioner could not recover. The Fifth Circuit committed no error.

CONCLUSION

For the reasons stated above, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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